In the Supreme Court of the United States

OCTOBER TERM, 1923

THE UNITED STATES OF AMERICA
v.
STEAMSHIP "COAMO," HER ENGINES, ETC., New York & Porto Rico Steamship Company, claimant. } No. 301

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This case comes before the Court upon a certificate of the Circuit Court of Appeals for the Second Circuit, under Section 239 of the Judicial Code, requesting the instruction of this Court upon the following question of law:

> When a libel in rem is filed against any vessel under the circumstances set forth in Section 10 of the act to regulate the immigration of aliens, passed February 5, 1917, and violation of that section of the statute is proven, is the trial court bound as matter

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of law to pass a decree condemning said vessel for a penalty of exactly $1,000, neither more nor less, for each alien landing from said vessel in violation of said section of said statute?

From the facts stated in the certificate it appears that the owners, officers, or agents of the steamship *Coamo* failed to prevent the landing of two aliens in the United States at a time or place other than as designated by the immigration officers, in violation of Section 10 of the Act of February 5, 1917, c. 29, 39 Stat. 874. A libel was thereupon filed against the vessel under the provisions of the said section, in which the United States demanded a penalty of $1,000 for each alien. This the District Court refused, holding that it had discretion as to the amount of the penalty, and imposed a penalty of $200 in respect of each alien and entered a final decree for $400 and costs. From this decree the United States appealed, assigning as error the refusal of the court to award the full amount.

The Government submits that:

1. The civil remedy by libel against the offending vessel, provided by the last clause of Section 10 of the Immigration Act, is wholly separate and distinct from the criminal remedy provided by the preceding clauses, and

2. The penalty to be recovered from the vessel is exactly $1,000, and the District Court is without power to impose a less or different penalty.

ARGUMENT

I

The civil remedy by libel against the offending vessel, provided by the last clause of Section 10 of the Immigration Act, is wholly separate and distinct from the criminal remedy provided by the preceding clauses

Section 10 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, under the last clause of which the proceeding in this case was instituted, provides:

> That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of any such person, owner, officer or agent to comply with the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than $200 nor more than $1,000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; *or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of $1,000 shall be a lien*

> *upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court.* [Italics ours.]

The answer to the question certified may best be found by laying aside for the time being the question of the amount of the penalty, and considering first the nature of the two remedies provided for the enforcement of Section 10. We shall endeavor to show that the last clause provides a civil remedy in rem which is wholly separate and distinct from the criminal remedy provided in the preceding clauses.

Section 10 of the Act of 1917 which we have quoted, was formerly Section 18 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, 904, which read as follows:

> It shall be the duty of the owners, officers or agents of any vessel or transportation line, other than those railway lines which may enter into a contract as provided in section thirty-two of this Act, bringing an alien to the United States to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the negligent failure of any such owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor, and be punished by a fine in each case of not less than one hundred nor more than one thousand dollars or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; and every such alien so landed shall be deemed to be unlawfully

> in the United States and shall be deported as provided in sections twenty and twenty-one of this Act.

Comparison of this section with Section 10 of the Act of 1917 discloses a general intention to make the penal provisions more stringent and more readily enforceable. The term "negligent failure" in the earlier enactment has been replaced by mere "failure," and the minimum fine to be imposed in a criminal proceeding has been increased from $100 to $200. The most important change, however, is the addition of a new clause providing an alternative remedy by a libel in rem against an offending vessel, "experience having demonstrated that it is often impracticable to hold a ship's master where it is possible to hold the vessel itself." (*Report of Senate Committee on H. R. 10384, 64th Congress, 1st Session, No. 352, page 10.*)

Before this change was made the section afforded a remedy by criminal prosecution, and that alone. No civil action, either in personam or in rem, could be maintained for the recovery of the fine which was there imposed. This is clear from the decision of this Court in *United States* v. *Claflin*, 97 U. S. 546.

In that case an action of *debt* was brought by the United States to recover certain penalties and forfeitures. A number of counts in the declaration were founded upon Section 4 of the Act of July 18, 1866, 14 Stat. 178, 179, c. 201 (Same as R. S. 3082), which was as follows:

> That if any person shall fraudulently or knowingly import or bring into the United

> States, or assist in so doing, any goods, wares, or merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such goods, wares, or merchandise, after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court. * * *

With respect to this the court said (p. 547):

> That the counts framed under Section 4 of the Act of 1866 cannot be sustained is too clear for debate, and the Government very properly has abandoned them as unsustainable. That act contemplated a criminal proceeding, and not a civil action of debt. It imposed a penalty for receiving, concealing, buying, selling, or in any manner facilitating the transportation, concealment, or sale of goods illegally imported. The penalty was a fine on conviction, not exceeding $5,000 nor less than $50, or imprisonment, or both, at the discretion of the court. It is obvious, therefore, that its provisions cannot be enforced by any civil action, certainly not in an action of debt.

Hepner v. *United States*, 213 U. S. 103 and *United States* v. *Regan*, 232 U. S. 37, were cases of a different character, in which it was held that under the

particular statutes there involved the penalties or forfeitures imposed might be collected either by criminal prosecution or in a civil proceeding. In the latter case Mr. Justice Van Devanter, after reviewing a number of decisions, said, (232 U. S. 37, 46):

> It is a necessary conclusion from these cases (1) that, as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize, and in this instance has authorized, the enforcement of such penalty by either a criminal prosecution or a civil action. * * * .

A comparison of the several statutes involved shows that the rule of the *Claflin case*, and not that of the *Hepner* and *Regan cases*, was applicable to the fine imposed by Section 18 of the immigration Act of 1907 before it was altered by the Act of 1917, and that such a fine could be recovered only by a criminal prosecution.

In view of this state of the existing law, what was the intention of Congress in adding the last clause giving the remedy against the offending vessel, which was pursued in the instant case?

Three constructions of this clause are possible.

(1) That a lien has been imposed upon the vessel as collateral security for the payment of such fine as may be imposed upon the owner, master, officer, or agent.

(2) That a civil remedy in rem has been provided for the collection from the vessel of the fine imposed by the earlier clause of the section, or

(3) That the vessel has been deemed to be the offender and a civil remedy in rem has been provided against it for the recovery, *not of the fine imposed by the earlier clause, but of a separate and distinct penalty which has been imposed upon the vessel itself.*

The trial judge, Hon. Julian W. Mack, did not deliver an opinion, but stated his conclusions at the close of the trial in a memorandum which appeared in the Transcript of Record in the Circuit Court of Appeals (p. 24) and which we have printed as an appendix to this brief. It is clear from this memorandum that his conclusions were based upon either the first or the second, probably the second, of the constructions suggested above, both of which we believe are erroneous.

The first construction is obviously untenable. It is precluded by the express language of the clause which provides that the remedy against the vessel is to be pursued in cases where it is "impracticable or inconvenient to prosecute the person, owner, master, officer, or agent." The remedy provided is one which is to be applicable to such case. If the lien imposed upon the vessel be merely collateral security for payment of such fine as may be imposed upon the individual offender in a criminal prosecution, the conviction of the defendant will be a condition precedent to enforcement of the lien, and the remedy will be worthless in the very class of cases for which it was designed. (Cf. *United States* v. *25 Packages of Hats*, 231 U. S. 358, and *The Scow "6–S,"* 250 U. S. 269.) Under such a construction

the trial court could not have imposed any penalty in the instant case for there had been no prior criminal prosecution or conviction, and "the conviction of the wrongdoer must be obtained, if at all, in another and wholly independent proceeding." (*Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399.)

The second construction assumes that Congress had no intention of imposing any new or different penalty for the offense, but merely intended to provide a means whereby the fine already provided for in the section might be collected as a penalty in a civil action in rem against the vessel. We think the language of the act precludes this construction also. If this had been the legislative intent, it would have been made effective by the use of the very simple and direct language which is used in Sections 31 and 32 of the same act.

Section 31 (39 Stat. 874, 895) provides that one violating its provisions "shall be liable to a penalty not exceeding $5,000, *for which sum the said vessel shall be liable* and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense." Section 32 employs the same language.

In R. S. 4469, the language was: "The penalties imposed * * * shall be a lien upon the vessel in each case * * *" and this was held to provide a civil remedy in rem against the vessel for the collection of specific penalties imposed by the preceding sections. (*Pollock* v. *Steamboat Sea Bird*, 3 Fed. 573, 574.) Section 8 of the Act of July 18,

1866, c. 201, 14 Stat. 180 (which later became Sec. 3088 of the Revised Statutes) provided merely that "such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily, by libel, to recover such penalty," and these words were held to have the same effect. (*United States* v. *The Steamship Queen*, 11 Blatchf. 416, 417; *The C. G. White*, 64 Fed. 579.)

In each of these cases the language employed is not only simple and direct, but contains words of reference to the penalty previously described, which indicate clearly that it is *that penalty*, and not a new and different one, which is to be collected from the vessel. No such language is used in the section which we are now considering.

It is significant also that the amount of the penalty is specified in this last clause. If the penalty to be collected from the vessel be the same as that previously specified, then the mention of $1,000 is useless surplusage. Congress did not say "*the* penalty," or "*the said* penalty," or "*such* penalty," or "for *which* sum," as in the other acts referred to, but said "*a* penalty *of $1,000* shall be a lien."

The language indicates rather that the third construction is the only reasonable and proper one. Under this construction Congress has provided an alternative method of enforcing the section, in cases where it is impracticable or inconvenient to prosecute the owner, officer or agent of the vessel. This is not merely a different method of enforcing the same penalty, but it is a distinct and different penalty

which is imposed upon the vessel as the offender, and is recovered in a civil proceeding in rem.

II

The penalty to be recovered from the vessel is exactly $1,000

The trial court assumed discretion to impose any penalty not less than $200 nor more than $1,000 upon the theory that it was imposing upon the vessel the fine described in the first part of the section. If our conclusion as to the nature of the penalty to be recovered from the vessel be correct, however, this action was erroneous. The case is then no different from any case where the legislature has prescribed a fixed and certain penalty, which must be imposed in the exact amount specified.

The decided cases in which courts have attempted to impose fines or penalties less than the sums fixed by statute, are few, but such as we have found hold that it can not be done.

In *Cotten* v. *Rutledge*, 33 Ala. 110, 115, an action was brought to recover a statutory penalty imposed upon any probate judge who should issue a marriage license to a girl under 18 years of age without the consent of her parents. Upon the trial the jury rendered a general verdict "For the plaintiff" without specifying any amount. Upon this verdict the court entered judgment for $500, which action was assigned for error. The Supreme Court said:

> When, as here, such suit is for a sum of money fixed by law as the penalty for the act

> of the defendant alleged in the complaint, and the case is tried on an issue joined on the complaint, if the plaintiff recovers at all, he must recover the specific sum fixed as the penalty; he cannot recover more or less; and the verdict of the jury, "We, the jury, find for the plaintiff"—is sufficient to authorize a judgment for the sum fixed by law as the penalty, and for the costs of the action.

In *Broadwell* v. *Conger*, 2 N. J. L. 210 (3d Ed. p. 195), suit was brought to recover a penalty of $4 for failure of the defendant to give two days labor upon the public roads. Judgment entered for a penalty of $2.50 and $2.29 costs, was reversed because it was not in the exact amount of the statutory penalty.

In *Canastota and Morrisville Plank Road Co.* v. *Parkill*, 50 Barb. (N. Y.) 601, action was brought to recover a penalty of $10 for passing a tollgate without paying toll. It appeared that the defendant, believing that he was not liable for the payment of more, had tendered half of the toll. From a judgment in favor of the defendant the plaintiff appealed, contending that it was entitled to recover at least the half of the toll. The Court said (p. 604):

> The action is for a penalty of a fixed amount, and for that alone; and unless the plaintiffs recover that, they are not entitled to any judgment; and the object of making and proving the tender, was only to establish that the plaintiffs are not entitled to anything, in the kind of action which they have brought. It may well be if the plaintiffs are

> defeated in this action, that they will be entitled to the amount tendered, in an action to recover the toll for passing the gate; and in such an action the defendant would be estopped by the tender from setting up that no toll was due. But not so here. The plaintiffs must recover a full penalty or nothing.

In *Taylor* v. *State*, 35 Wis. 298, 302, it was held that under a statute which imposed a fine or penalty of not less than $10 nor more than $50, judgment for $5 was erroneous and would be reversed even at the suit of the defendant.

We recognize that these cases differ somewhat from the one at bar, but they rest upon the same fundamental principle that where the legislature has specified the amount of a penalty without giving the court discretion to alter it, the court is utterly devoid of power to impose a less or different one. To do so would be judicial legislation. The same principle determined the following decisions.

The Act of March 3, 1903, Sec. 15, 32 Stat. 1213, 1217, c. 1012, provided that for failure to furnish certain lists or manifests the master of a vessel should pay to the collector of customs "the sum of ten dollars for each alien concerning whom the above information is not contained in any list." Inquiry was made of the Attorney General.

> Has the collector of customs authority to fine or collect a sum of less than $10 for each alien, concerning whom the above information is not contained in any list or manifest?

To which Attorney General Moody replied:

> I am of opinion that the penalty prescribed in every case of failure within this section is $10, and that the section no more authorizes the imposition or collection of a smaller sum than it does that of a larger. (25 Op. Atty. Gen. 336, 338.)

It was held in *Nelson* v. *State*, 46 Ala. 186, that where a statute provided that the amount of a penalty should be fixed by a jury, the court can not do so.

And in *Fitzgerald* v. *State*, 4 Wis. 395 and *Stevens* v. *Commonwealth*, 4 Met. (Mass.) 360, it was held that where a statute provided for imprisonment at hard labor preceded by a period of solitary confinement, a sentence of imprisonment at hard labor without any period of solitary confinement, was erroneous and void. In the former case the court thus concisely stated the principle (4 Wis. at p. 398):

> It is not the judgment the statute prescribes, and therefore is erroneous.

Good reasons might be assigned why Congress should have given the court discretion to fix the penalty in the criminal action and not in the civil action, but with these we are not concerned. It has the power, and it has frequently exercised it, of fixing specific penalties; and of imposing them, where occasion arises, without regard to the culpability, negligence or bad faith of the defendant. (*C., B. & Q. Ry.* v. *United States*, 220 U. S. 559, 579.)

Finally, an examination of other sections of the same act discloses that Congress employed different

language in imposing different penalties, from which it must be concluded, upon well settled principles of statutory construction, that a difference was intended.

Fixed fines or penalties are imposed by the following sections, 39 Stat. 874, c. 29:

Section 5, "the sum of $1,000," and "a fine of $1,000."

Section 7, "the sum of $400."

Section 9, "the sum of $200."

Section 14, "the sum of $10."

Section 18, "the sum of $300."

Section 35, "the sum of $50."

Section 36, "the sum of $10."

It is significant that in the last two of these sections discretion has been given to the Secretary of Labor to mitigate the penalties imposed. Section 35 contains this proviso: "Provided further, That such fine may, in the discretion of the Secretary of Labor, be mitigated or remitted." Section 36 provides that the penalty therein provided for shall be imposed only "if required by the Secretary of Labor."

Other sections provide for fines and penalties which may be varied in the discretion of the court, as follows:

Section 4, "a fine of not more than $5,000."

Section 8, "a fine not exceeding $2,000."

Section 10, "a fine in each case of not less than $200 nor more than $1,000."

Section 16, "a fine of not more than $2,000."

Section 28, "a fine of not more than $5,000."

Section 31, "a penalty not exceeding $5,000."

Section 32, "a penalty not exceeding $1,000."

Occurring in a statute where Congress has so clearly indicated those fines and penalties which are fixed and those which are uncertain, the words "a penalty of $1,000," used in the last clause of Section 10, can be construed only to mean that the penalty shall be exactly $1,000, neither more nor less.

CONCLUSION

The question certified by the Circuit Court of Appeals should be answered in the affirmative.

Respectfully submitted.

JAMES M. BECK,
Solictor General.

GEORGE ROSS HULL,
Special Assistant to the Attorney General.

APRIL, 1924.

APPENDIX

DECISION

NEW YORK, *Sept. 27, 1921.*

United States v. *Steamship Coamo*

The statute does not say that the Court shall impose a penalty, it says the penalty shall be a lien. In other words, the point is not the amount, but it is the lien. The penalty shall be a lien, and it is only if it is impracticable or inconvenient to prosecute. I must take the statement that it is inconvenient to prosecute the master or the owner of the vessel. Now, in order to hold the vessel—and the report shows that that is the purpose of it—the lien is given on the ship. The lien for what? The lien for the penalty of a thousand dollars? In view of this being a part of the preceding section, what does that mean? The imprisonment can not be a lien. It is the money that is going to be the lien. Well, what money? A penalty. Construed absolutely literally a penalty of a thousand dollars would require a thousand dollars: but doesn't it mean a penalty up to a thousand dollars, giving the Court discretion as to the amount of the penalty? I think it does, and I will so hold, and I will levy a fine of $200 in each case.

JULIAN W. MACK,
U. S. Cir. Judge.

Filed Oct. 17, 1921.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA

AGAINST

SS. COAMO, her engines, etc.,
NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
Claimant.

No. 47

BRIEF FOR CLAIMANT

Section 10 of the Immigration Act of 1917 has now been amended by Section 27 of the Immigration Act of 1924 so that the language involved in this case is no longer in the law.

The pertinent part of Section 10 now reads:

"Or, if in the opinion of the Secretary of Labor, it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vesel, such person, owner, master, officer, or agent shall be liable to a penalty of $1,000, which shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court" (Act of May 26, 1924).

POINTS

I. SECTION 10 OF THE IMMIGRATION ACT OF 1917 DOES NOT IMPOSE A FIXED PENALTY OF $1,000 ON THE VESSEL. IT MERELY MAKES A LIEN ON THE VESSEL SUCH PENALTY AS THE COURT, IN ITS DISCRETION, MAY IMPOSE WITHIN THE LIMITS OF $200 AND $1,000.

The 1917 amendment does not impose a *liability* against the vessel, as could readily have been done if the amount, where proceedings are against the vessel, was to be different from that where proceedings are against the owner, etc. Nor does it impose a liability upon the owner, etc., as does the 1924 amendment. The 1917 amendment merely makes the vessel subject to a lien, this lien being imposed upon

"the vessel whose owner, * * * violates the provisions of this section."

The owner and officers named are the offenders under the 1917 amendment, as well as under the earlier part of the statute. The amendment merely gives a lien to secure a recovery against the offender. The liability of the offender, which is secured by a $1,000 lien, is found in the earlier part of the section.

Indeed, the same is true of the shipowner's duty and of the definition of the offense. Neither is stated in the amendment: both must be found in the earlier part of the statute.

Under the original statute, the owner or his officer is liable between the limits of $200 and $1,000. The 1917 amendment deals with the same offense and the same

offenders, the owner or officers, the lien being upon the vessel

"whose owner, etc., violates the provisions of this section."

The vessel is not stated to be the offender. The offender is the owner, officer, etc. The lien on the vessel merely secures a recovery for their wrong.

The word "lien" connotes security for an obligation, not an obligation itself. *Empire Trust Co.* v. *Egypt Ry. Co.*, 182 Fed. 100, 102; *Rohrbach* v. *Germania Fire Insurance Co.* 62 N. Y. 47; *Hotchkiss* v. *National City Bank*, 200 Fed. 287, 291. A lien is commonly more extensive as to amount than is the obligation which it secures. Indeed, commonly the obligation varies from time to time.

Here, in order to secure any penalty within the limits of the Court's discretion, the statute properly made the lien commensurate with the maximum penalty which could be imposed, namely $1,000.

The record in Congress supports our view. Although the report of the Senate Committee purports to explain the 1917 amendment and to state its purpose, nothing is said of any change in the amount of the recovery or in the court's discretion. On the contrary, the report shows that the object of the amendment was to make recovery certain, not to change the amount thereof. The language of the report is:

"with the addition of an alternative *method* of punishing violators thereof, experience having demonstrated that it is often impracticable to hold the ship's master where it is possible to hold the vessel itself" (Report of Senate Committee, 64th Congress, First Session, No. 352).

It will be observed that the report does not refer to an alternative *remedy*, as the Government paraphrases it, but to "an alternative *method*" of punishing offenders.

The Government argues that Congress could have used clearer language had its intention been as we claim. But clearer language could likewise have been used had the intention been as the Government claims. This is well illustrated by the language found in the 1924 amendment. There a *liability* is imposed upon the owner, master, etc., and the amount of the liability is definitely fixed. The 1917 amendment imposes no liability on the owner, or his representative, but merely a lien

"upon the vessel whose owner, etc., violates"

the statute. For the amount of the liability of the owner, or his representative, recourse must be had to the earlier part of the section, where liability is fixed at $200 to $1,000.

The Government urges that the purpose of the 1917 amendment was to make the vessel the offender, with a separate and distinct penalty against it. But the amendment does not purport to treat the vessel as the offender. The amendment refers not to the *vessel* which violates the statute, but to the vessel whose *owner,* etc., violates the statute. Nor does the statute impose a *liability* upon the vessel. The vessel is merely the medium through which the Government may recover for the offense of the owner, etc., where it is impracticable to go directly against the offender.

Our argument is not, as the Government suggests, that the vessel is the security out of which a *fine* imposed after conviction can be collected.

The purpose of the amendment, we believe, was as the Senate Report indicates, namely, to allow, through the medium of the vessel, a method, alternative to conviction and fine, of recovering the $200 to $1,000. Under the first alternative conviction is necessary, under the second it is not. The recovery is the same. Only the method is different.

But, if there is doubt as to the meaning of the 1917 amendment, the doubt should be resolved in favor of the claimant, for the statute, being penal, should be strictly construed.

THE QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS SHOULD BE ANSWERED IN THE NEGATIVE.

CHARLES C. BURLINGHAM,
RAY ROOD ALLEN,
Proctors for Claimant,
27 William Street,
New York City.